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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

KEVIN WEBSTER, Plaintiff and Appellant, v. KENDRA WEBSTER, Defendant and Respondent.	A152717 (Alameda County Super. Ct. No. RG16823622)

Kevin Webster, who also uses the name Kevin Gilmore, contends that Kendra Webster prevented him from receiving an inheritance from their father, Willie Webster, who passed away in 2013. For clarity, we will refer to these parties by their first names. The trial court sustained a demurrer without leave to amend to Kevin's first amended complaint for intentional interference with an expected inheritance, fraud and negligence. In this pro per appeal,[1] Kevin contends he has a right to maintain the underlying lawsuit to prove that he is Willie's son and rightful heir. We affirm the judgment.

I. Background

A. Complaint Allegations

Kevin filed his original complaint in July 2016. In his operative first amended complaint, Kevin alleged the following facts about his family history: Kevin was

[1] Although the notice of appeal was filed prematurely, we will construe it as an appeal from the judgment of dismissal that was entered after the demurrer was sustained without leave to amend. (*Vibert v. Berger* (1966) 64 Cal.2d 65, 67–68.)

conceived while his mother was estranged from her husband and living with Willie, but she and Willie went their separate ways before Kevin was born in 1962. Kevin's mother named her husband as the father on Kevin's birth certificate because she was "displeased" that Willie had boasted to friends that he had two women pregnant at the same time. In 1962, Willie and his wife Kathleen had a son named Nathaniel, and in 1971 their daughter Kendra was born. Kevin believes that Kathleen was "fully aware" that Willie was Kevin's father, and that Kendra also became aware that Willie had another son. Kevin also believes that he had a good relationship with Willie, who visited "[o]n occasion" and was aware that Kevin had a child of his own in 2011.

Kevin alleged that Willie was "debilitated" by cancer for the last decade of his life, and that the following events occurred during that period: In approximately 2005, Kendra relocated from Los Angeles and moved in with Willie because she saw an "opportunity to acquire his home and assets." Thereafter, she abused and neglected Willie and admitted on social media that she was impatiently waiting for him to die. After Willie died, Kendra and Kathleen "claimed that they first discovered a holographic will" signed by Willie on January 23, 2008, which left all of Willie's assets to Kendra (the 2008 will). However, Kevin believes that Willie died intestate and that Kendra and Kathleen created the 2008 will after they realized that Kevin would have an interest in Willie's estate if he were to die without leaving a will.

Kevin alleged the following facts about a petition to probate the 2008 will that Kendra filed in 2013: Kevin received notice of the petition, which listed him as Willie's son. He filed an objection and sought "to have the probate declared an intestate proceeding, preserving his right to an interest in the Willie Webster estate." During a deposition in the probate proceeding, Kendra admitted that Willie "told her that he had another son, and that she was told Kevin was her brother." However, after she made this admission, Kendra "committed fraud" by filing "objections denying that Kevin was Willie Webster's son, and asserting that Kevin had no standing to be in probate court as an interested party." Thereafter, on December 3, 2013, the probate court "issued an order ruling that Kevin had no standing as an interested party in the Willie Webster estate."

Kendra was awarded 100% of Willie's estate, which was valued at more than $1,200,000.00. Kevin filed an appeal from the final distribution order in the probate case, but it was dismissed for lack of standing.

Kevin incorporated his allegations into causes of action against Kendra for (1) intentional interference with expectation of an inheritance (or IIEI), by coercing Willie to sign the 2008 will; (2) fraudulent concealment, by hiding the fact that Kevin is Willie's son; (3) fraudulent misrepresentation, by falsely representing that Kevin is not her brother; and (4) negligence, by breaching her duties as a sibling and estate administrator to allow Kevin to participate in the probate proceeding.

B. Kendra's Demurrer

In August 2017, Kendra filed a demurrer to the first amended complaint, which was accompanied by a request to take judicial notice of court records from the probate case referenced in Kevin's first amended complaint, *Estate of Willie S. Webster, Jr.*, case no. RP13672497. These probate court records showed the following pertinent facts:

Willie died on February 2, 2013 and the following month Kendra filed a petition to probate his 2008 will. On April 23, 2013, Kevin (using the last name Gilmore) filed an objection and will "contest," alleging that the 2008 will was either a forgery or procured by fraud and undue influence. In May 2013, Kevin filed a petition seeking letters of administration based on allegations that he was Willie's son and Willie died intestate. Kendra objected to Kevin's petition and disputed his standing to participate in the probate case as an interested party.

On December 3, 2013, the probate court filed an order granting Kendra's petition to probate the 2008 will, overruling Kevin's objection and dismissing his competing petition. The court concluded that Kevin was not an interested party under Probate Code section 48, because he failed to prove his allegation that he was Willie's "child."[2] In

[2] Under section 48 of the Probate Code, an "interested person" includes "[a]n heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding."

reaching this conclusion, the court found that Kevin "failed to present any evidence that the decedent, at any time during his lifetime, received [Kevin] into his house or openly held him out as his natural child." (See Prob. Code, § 6453.) In January 2014, the probate court denied Kevin's motion for reconsideration of the December 2013 order.

In May 2015, the probate court filed an order for final distribution of Willie's estate. Kevin filed an appeal from the final distribution order, but it was dismissed by a different panel of this court because the December 2013 order establishing that Kevin was not an interested party meant that he did not have a property right or claim against Willie's estate and likewise had no right to appeal from an order distributing that estate.

During the demurrer proceeding in the present case, Kendra argued that records from the probate court case established that (1) Kevin's IIEI claim was factually and legally deficient; (2) Kevin's fraud and negligence claims were barred by res judicata and collateral estoppel; and (3) all of Kevin's claims were barred by the statute of limitations.

C. The Demurrer Rulings

The day before a September 2017 hearing on the demurrer, the trial court published a tentative ruling to sustain the demurrer without leave to amend. Kevin's counsel gave notice that he would appear and contest the tentative. However, on the day of the hearing, Kevin's counsel did not appear in court but instead filed a request on behalf of Kevin for a dismissal of the action without prejudice, which was entered by a clerk who was unaware of the pending demurrer.

On October 2, 2017, the trial court filed a six-page order sustaining Kendra's demurrer without granting Kevin leave to amend. Preliminarily, the court vacated the clerk's entry of dismissal, finding that Kevin did not have the right to voluntarily dismiss his case in response to an unfavorable tentative ruling on a dispositive motion. (See e.g. *Groth Bros. Oldsmobile v. Gallagher* (2002) 97 Cal.App.4th 60, 73.) Then the court adopted verbatim the tentative ruling published the day before the hearing on the demurrer. In that order, the court granted Kendra's request for judicial notice, addressed separately the three grounds pursuant to which Kendra brought her demurrer, and sustained the demurrer on all three grounds.

Intentional Interference with an Expected Inheritance: The trial court observed that IIEI was first recognized as a tort under California law in *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039 (*Beckwith*). The court found, however, that Kevin failed to state facts to prove this claim for at least three reasons: (1) Kevin's alleged expectancy of inheriting assets from Willie's intestate estate was inherently speculative; (2) The IIEI tort was not available to Kevin because he had an adequate remedy for his alleged harm in the probate court, in the form of a will contest; and (3) Kevin failed to allege facts to show that Kendra's allegedly tortious conduct of fraudulently procuring the 2008 will caused him damage by depriving him of an inheritance. On this third point, the court explained that Kevin's pleaded theory was that he would have received an inheritance if not for the 2008 will, but he alleged no facts to prove this theory. Moreover, judicially noticed records showed that Kevin's claims that he was Willie's "child" and would have had an interest in Willie's estate if he had died intestate were conclusively decided against him in the probate case.

Res Judicata: The trial court found that Kevin's fraud and negligence claims were barred by the doctrines of res judicata and collateral estoppel. Each cause of action sought to adjudicate the same primary right and the same issue: that, as the natural child of Willie, Kevin would have received a share of Willie's estate if he had died intestate. However, this issue was decided against Kevin in the probate court order denying Kevin's objection to Kendra's petition to probate the 2008 will, in the probate court order denying Kevin's motion for reconsideration, and in the Court of Appeal's dismissal of Kevin's appeal.

Statute of Limitations: Finally, the trial court found that all of Kevin's causes of action were barred by the applicable statute of limitations. The limitations period is three years from the date of discovery for fraud (Code Civ. Proc., § 338, subd. (d)) and two years for negligence and IIEI (Code Civ. Proc., § 339, subd. (1)). Here, judicially noticed records showed that the facts alleged by Kevin in this case were known to him on April 23, 2013, the date he filed his will contest in the probate case. However, he did not file the present case until more than three years later in July 2016.

In concluding Kevin's claims are barred by the statute of limitations, the court rejected Kevin's argument that he alleged facts to show Kendra committed fraud and breached her duties in December 2013, which was within the three-year limitations period. According to this theory, Kendra's tortious act was the filing of an opposition to Kevin's objection to the probate petition, which concealed and/or denied that Kevin was her brother. The trial court found that this theory (1) could not save the IIEI or negligence claims, which have two-year statutes of limitation; and (2) did not state a fraud claim against Kendra because Kevin did not allege that he relied on allegedly false statements or fraudulent omissions in Kendra's probate court filings. The trial court also found that this theory could not be used to prove Kendra committed a fraud on the probate court. Under Code of Civil Procedure section 473, a litigant has six months from entry of judgment to move to set aside an otherwise valid judgment because of extrinsic fraud. Here, Kevin waited more than six months to file his complaint in the present action. Moreover, he did not allege facts to prove extrinsic fraud.

III. Discussion

A. Issues presented and Standard of Review

Kevin challenges several findings in the order sustaining Kendra's demurrer, but often fails to provide legal argument or authority to support his position. Moreover, he discusses many issues that do not relate to the demurrer at all.

A fundamental rule of appellate procedure is that "[t]he judgment appealed from is presumed correct. [Citation.] The appellant must challenge a judgment by 'rais[ing] claims of reversible error or other defect [citation], and "present[ing] argument and authority on each point made." ' [Citation.] 'This means that an appellant must do more than assert error and leave it to the appellate court to search the record and the law books to test his claim.' [Citation.] 'It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness.' " (*Flores v. Department of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199, 204–205.)

Appellate rules also establish mandatory requirements for an appellant's brief, which are set forth in rule 8.204 of the California Rules of Court. Rule 8.204(a)(2) states

that an appellant's opening brief must include "a summary of the significant facts limited to matters in the record." (Rule 8.204(a)(2)(C).) Rule 8.204(a)(1)(B) requires that each point in an appellate brief must be stated "under a separate heading or subheading summarizing the point," and be supported by an argument. And, rule 8.204(a)(1)(C) establishes that each matter discussed in an appellate brief must be supported with a proper citation to the appellate record.

Kevin's appellate briefs do not comply with the rules outlined above.[3] His factual summary ignores significant facts and focuses on matters outside the record; his arguments are not presented in an organized way and do not correspond to the headings under which they appear; and he repeatedly fails to cite the record for factual assertions, occasionally referencing documents attached to his brief that are not part of this record.

To the extent Kevin directs us to a ruling by the trial court in this case, we have considered his arguments. However, claims that are not accompanied by citation to potentially pertinent authority or a cognizable legal argument will not be discussed and are deemed waived. (See e.g. *In re S.C.* (2006) 138 Cal.App.4th 396, 408; *Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) Moreover, we will not consider evidence attached to Kevin's briefs that is not part of this record; address complaints about matters that are not relevant to an issue on appeal; or entertain challenges to findings that were made in a different case.[4]

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[3] The rules of appellate procedure apply to Kevin even though he is representing himself on appeal; the law affords pro per litigants " 'the same, but no greater consideration than other litigants and attorneys.' " (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.)

[4] For example, Kevin argues that the probate court's orders prevent him from proving "the facts about his ancestral lineage"—or "who he actually is"—and in so doing violate many of his constitutional rights. Kevin misunderstands the court's orders. The probate court in its December 3, 2013 order does not purport to decide whether Kevin is Willie Webster's biological son. The order only addresses whether Kevin has established the legal requirements for being treated as a son under the laws of intestate succession, which include different and additional requirements. (See, e.g. Prob. Code, § 6453.)

In determining whether the demurrer was properly sustained, our standard of review is de novo. (*Rufini v. CitiMortgage, Inc.* (2014) 227 Cal.App.4th 299, 303–304.) "[W]e examine the complaint's factual allegations to determine whether they state a cause of action on any available legal theory. [Citation.] We treat the demurrer as admitting all material facts which were properly pleaded. [Citation.] However, we will not assume the truth of contentions, deductions, or conclusions of fact or law [citation], and we may disregard any allegations that are contrary to the law or to a fact of which judicial notice may be taken.' " (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 792.)

In determining whether the demurrer was properly sustained without leave to amend, " ' "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." ' " (*Rufini v. CitiMortgage, Inc*., supra, 227 Cal.App.4th at p. 304.)

B. IIEI Issues

As the trial court found, the tort of intentional interference with an expected inheritance was first recognized by a California court in *Beckwith, supra*, 205 Cal.App.4th 1039. *Beckwith* holds that "a court should recognize the tort of IIEI if it is necessary to afford an injured plaintiff a remedy. The integrity of the probate system and the interest in avoiding tort liability for inherently speculative claims are very important considerations. However, a court should not take the 'drastic consequence of an absolute rule which bars recovery in all . . . cases' when a new tort cause of action can be defined in such a way so as to minimize the costs and burdens associated with it. [Citation.] . . . California case law in analogous contexts shields defendants from tort liability when the expectancy is too speculative. In addition, case law from other jurisdictions bars IIEI claims when an adequate probate remedy exists. By recognizing similar restrictions in IIEI actions, we strike the appropriate balance between respecting the integrity of the

probate system, guarding against tort liability for inherently speculative claims, and protecting society's interest in providing a remedy for injured parties." (*Id.* at p. 1056.)

To state an IIEI claim under *Beckwith,* the plaintiff must plead facts to prove five elements: (1) that the plaintiff had an expectancy of an inheritance; (2) causation, i.e., facts demonstrating with reasonable certainty that the plaintiff would have received a bequest or devise if not for an interference by the defendant; (3) intent, i.e., that the defendant knowingly and deliberately interfered with the expected inheritance; (4) that the defendant's deliberate conduct was independently wrongful, for a reason other than that it interfered with an expected inheritance; and (5) resulting damage. (*Beckwith, supra,* 205 Cal.App.4th at p. 1057.)

In the present case, Kevin contends that the trial court erred by concluding that he failed to allege facts to prove the causation element of this tort, arguing that Kendra's alleged interference caused him "and other family members nothing but damage, harm and suffering." This generalization misconstrues the causation element of IIEI. As the *Beckwith* court explained, causation is a "threshold requirement . . . built into the IIEC tort" to ensure that the alleged expectancy is not too speculative, and that this tort will not be used to invade the testator's province to dictate the disposition of his or her assets. (*Beckwith, supra,* 205 Cal.App.4th at pp. 1055.) Therefore, an IIEI plaintiff must allege facts to show with reasonable certainty that "but for the interference of a third party, he would have inherited from the decedent." (*Ibid.*) Kevin has failed to do that here.

Kevin alleged that Kendra interfered with his expected inheritance by fraudulently procuring the 2008 will, but he did not allege any facts to prove with reasonable certainty that he would have received an inheritance if that will had not been executed. Moreover, the trial court took judicial notice of a probate court order proving that Kendra's actions did not interfere with Kevin's expectation in a way that caused him damage because Kevin failed to establish that he is Willie's child for purposes of intestate succession. Absent that proof, Kevin would not have had a right to inherit Willie's property even if Willie had died intestate.

Kevin contends that the trial court erred by denying him the opportunity to amend his IIEI claim. However, he offers nothing to satisfy his burden of demonstrating that there is a reasonable possibility this defect can be cured by an amendment. (*Rufini, supra,* 227 Cal.App.4th 299, 304.) Furthermore, even if Kevin could allege facts to prove causation, it appears that the tort of IIEI is not available to Kevin under the facts alleged and/or judicially noticed. Under *Beckwith,* a court should recognize the tort of IIEI only "if it is necessary to afford an injured plaintiff a remedy." (*Beckwith, supra,* 205 Cal.App.4th at p. 1056.) In the present case, the record establishes conclusively that Kevin did have a remedy for the alleged interference with his expected inheritance – to bring a will contest in probate court, which is exactly what he did.

C. Res Judicata

" 'Under the doctrine of res judicata [claim preclusion], "all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date." [Citation.] [¶] A claim raised in a second suit is "based on the same cause of action" as one asserted in a prior action if they are both premised on the same "primary right." [Citation.] "The plaintiff's primary right is the right to be free from a particular injury, regardless of the legal theory on which liability for the injury is based." ' " (*Gillies v. JPMorgan Chase Bank, N.A.* (2017) 7 Cal.App.5th 907, 914.) Furthermore, res judicata has a " 'secondary aspect' " "commonly known as collateral estoppel," which precludes re-litigation of issues in the second action that were conclusively decided in the first action. (*Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 758, 769–770.) This doctrine may be applied on demurrer where the facts pleaded and judicially noticed indicate as a matter of law that the doctrine applies. (*The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 842.)

Kevin contends that his claims are not barred by res judicata because he suffered " 'separate and distinct harms' " in this case and the probate case. According to this argument, Kevin's harm in the probate case was that he "did not receive Letters of Administration," and his harm in this case "stems from [Kendra's] hiding of assets" and deception on the probate court. We are not persuaded by this logic. The record shows

that Kevin has sued the same party he challenged in the probate court (Kendra), alleging a violation of the same right he asserted in probate court, i.e., that Kendra used the 2008 will to deprive Kevin of his right to acquire a share of Willie's intestate estate. Furthermore, all the claims alleged here *depend* on Kevin being able to prove that he is Willie's child for purposes of intestate succession. That issue was also litigated and resolved against Kevin in the probate court. Thus, Kevin's claims are barred by res judicata and/or collateral estoppel.

D. Statute of Limitations

"The collective term 'statute of limitations' is commonly applied to a great number of acts that prescribe the periods beyond which actions may not be brought." (3 Witkin, California Procedure (5th ed. 2008) Actions, § 430, p. 546.) "[T]he applicable statute of limitations is determined by—as variously phrased—the nature of the right sued upon, the primary interest affected by the defendant's wrongful conduct, or the gravamen of the action." (*Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1158–1159.) When the gravamen of the action is negligence, the two-year limitations period codified in section 339 of the Code of Civil Procedure applies. (*Ibid*.) By contrast, under section 338(d) of the Code of Civil Procedure, a three-year limitations period applies to an "action for relief on the ground of fraud or mistake."

Thus, the longest potential limitations period in this case is the three-year statute of limitations for fraud. Kevin does not contend otherwise, but he argues the trial court erred by concluding that his complaint was untimely. According to Kevin, the statute of limitations did not begin to run until "the appeal in the probate [case] was exhausted" because only then was he "left without a remedy." Kevin provides no authority for this novel theory. If he is suggesting that an IIEI cause of action does not accrue until the plaintiff has no other remedy, he misunderstands this law. IIEI is an available tort only when there would otherwise be no remedy; it is not a second chance to pursue a remedy that has already been denied in the probate court.

An action for relief on the ground of fraud is deemed to have accrued when the aggrieved party discovers the facts constituting the fraud. (Code Civ. Proc., § 338, subd. (d).) "The action accrues when a plaintiff first learns that a fraud may have occurred, so long as he or she could have confirmed the fraud through further investigation." (*Hacker v. Homeward Residential, Inc.* (2018) 26 Cal.App.5th 270, 282.) In this case, Kevin alleges that Kendra committed fraud by procuring the 2008 will. The record shows that Kevin must have known the facts supporting this claim in April 2013 because he made the same claim in his objection to the petition Kendra filed in Willie's probate case. And yet Kevin did not file the present action until July 2016. Thus, Kevin's claims are not timely, even under the longest statute of limitations that could potentially apply.

IV. Disposition

The judgment is affirmed. Costs are awarded to Kendra.

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Tucher, J.

We concur:

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Pollak, P.J.

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Brown, J.